(4)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	CR-94-03-GF-PGH Title 18 U.S.C. § 922(g) FELON IN POSSESSION (Penalty: 10 years imprisonment without parole and/or $250,000 fine) Title 18 U.S.C. § 924(c) USE OF A WEAPON IN A VIOLENT CRIME (Penalty: Mandatory 5 Years Imprisoned without Parole) Title 18 U.S.C. § 1153 & 113(e) ASSAULT WITH A DANGEROUS WEAPON (Penalty: 5 years imprisonment without parole and/or $1,000 fine)

INDICTMENT

(Filed Febr. 17 1994)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, JOHNNY LYNN OLD CHIEF, having been

convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g).

COUNT II

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, JOHNNY LYNN OLD CHIEF, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c).

COUNT III

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial

number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

A TRUE BILL.

/s/ JoAnn Duncan
FOREPERSON

/s/ Illegible
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	No. CR-94-03-GF-PGH

DEFENDANT'S MOTION IN LIMINE

(Excerpted from Defendant's Pretrial Motions)

Defendant OLD CHIEF moves this Court in limine to order the prosecution to refrain from mentioning – by reading the Indictment, during jury selection, in opening statement, or closing argument – and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.

It is specifically alleged in the Indictment (Count I) that Defendant OLD CHIEF has been convicted of one felony crime, to-wit: "having been convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is,

Assault Resulting in Serious Bodily injury, in the United States District Court in and for the District of Montana on the 28th day of September, 1989. . . . " If the jury is informed as to the name of Defendant's prior conviction, i.e., Assault Resulting in Serious Bodily Injury, and any details thereof, it would have such a prejudicial effect on the jury that the jury would be unfairly influenced in deciding whether or not there is proof beyond a reasonable doubt, particularly as to Counts II and III.

Defendant OLD CHIEF is willing to solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of crime punishable by imprisonment exceeding one (1) years. See Defendant's Proposed Jury Instruction No. 7 attached hereto as Exhibit "A". he thus would stipulate that the Government has proven one of the essential elements of the offense of Count I: Unlawful Possession of a Firearm and the Court would instruct the jury that this element is proven. There would be absolutely no need to tell the jury what the conviction was for.

Under FRE 403, a district court must weigh the probative value of evidence of a conviction against its prejudicial effect. *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990). As stated in *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982).

> " . . . the court must exclude any evidence having a prejudicial effect that substantially exceeds its probative value."

A conviction of a prior felony assault offense is certainly prejudicial where the Defendant is being accused of Assault With a Dangerous Weapon (Count III) and

Using or Carrying a Firearm During the Commission of a Crime of Violence (Count II). Thus, this Court must consider Rule 403's requirement to weigh the probative value, if any, against the prejudicial effect. *Ono*, at p. 1465.

The fact that there was an assault conviction, is not probative. All that § 922(g)(1) requires is a *felony* conviction. The Defense is willing to stipulate that Defendant OLD CHIEF has a felony conviction and that the jury be so instructed.

An offer to stipulate is relevant under FRE 403. *See, United States v. Davis*, 792 F.2d 1299, 1[illegible] (5th Cir. 1986). The Fifth Circuit, in *United States v. Spletzer*, 535 F.2d 950, 955-956 (5th Cir. 1976), held that it was error to admit a certified copy of the defendant's prior conviction into evidence as being prejudicial where the defense agreed to stipulate to the conviction and there was no prosecutorial need for such evidence. *Accord: United States v. Yeagin*, 927 F.2d 798, 801-803 (5th Cir. 1991) ("We believe that the prosecutor's need to introduce evidence of [the defendant's] nine prior convictions was negligible in comparison to the extremely prejudicial effect that this evidence must have had on the jury.").

The Seventh Circuit has stated that indictments and evidence should not make the jury aware of any prior convictions beyond those necessary as an element of the offense. *United States v. King*, 897 F.2d 911, 913 (7th Cir. 1990). The reasoning is clear:

> "The danger inherent in submitting evidence of a defendant's prior convictions to a jury needs little explanation. . . . [A] jury may be willing to convict a defendant based on the inference that he or she was acting in conformity with past misconduct rather than upon the government's proof beyond a reasonable doubt." *United States v. Lowe*, 860 F.2d 1370, 1381-1382 (7th Cir. 1988)

The Ninth Circuit had held that if a defendant had stipulated to being a convicted felon, proof of his prior convictions may have been prejudicial error. *United States v. Lloyd*, 981 F.2d 1071, 1072 (9th Cir. 1992). Proof here of Defendant OLD CHIEF's prior assault conviction is unnecessary and certainly prejudicial. See *United States v. Dunn*, 946 F.2d 615, 619-20 (9th Cir. 1991).

There is presently a conflict in the Ninth Circuit on this stipulation issue. In *United States v. Barker*, 1 F.3d 957, 959 fn.3 (9th Cir. 1993), the Court stated that "[t]he underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not." *See*, also, *Lloyd*, 981 at p. 1072. In *United States v. Breitkreutz*, 8 F.3d 688, 690-692 (9th Cir. 1993), the court held that admission of proof of three prior felony convictions, when only one conviction was required to support a conviction under § 922(g)(1), was reversible error because the jury might have been influenced by its knowledge of the defendant's criminal history. However, the *Breitkreutz* court stated that the defendant's offer to stipulate to prior offense does not preclude the Government from proving the prior offense as an element of § 922(g)(1). Unlike *Breitkreutz*, the case at bar includes two other charges in addition to the § 922(g)(1) charge. Furthermore, Defendant OLD CHIEF is willing to agree that the Court instruct the jury that the first element of Count I is proven.

The element required to be proven for Unlawful Possession of a Firearm (Count I) is that Defendant OLD CHIEF had been convicted of a felony. There is no need to tell the jury that the particular felony was Criminal Possession of Dangerous Drugs [sic – Assault Resulting in Serious Bodily Injury] or to explain any of the circumstances of this offense. If the Court were to allow the Government to mention or present evidence of these convictions, the jury may convict based on Defendant's past misconduct rather than on proof beyond a reasonable doubt of the present charges.

In the United States District Court
for the District of Montana,
Great Falls Division

(Caption Omitted in Printing)

INSTRUCTION NO. ___

The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

In [sic] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

Defendant's Proposed Instruction No. 7

SOURCE: Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th Ed.) § 36.10

"Crime Punishable by imprisonment for a Term Exceeding One Year" – Defined

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR 94-3-GF-PGH
JOHNNY LYNN OLD CHIEF, Defendant.	)	

GOVERNMENT'S RESPONSE TO MOTION IN LIMINE

(Excerpted from Government's Response to Pretrial Motions)

* * *

The defendant seeks to prohibit the United States from proving that the defendant has been convicted of a felony, or more specifically, to prohibit the United States from discussing the nature of the felony, by stipulating to the existence of that element and seeking to prohibit any discussion regarding the prior conviction. While the United States tends to agree with the defendant that the gratuitous "piling on" of prior convictions would be prejudicial; *United States v. Lipps*, 659 F.2d 960 (9th Cir. 1981), *United States v. Breitkreutz*, 8 F.3d 688, 692 (9th Cir. 1993), it does not believe that proving one prior conviction, a necessary element of the offense, is inherently more prejudicial than probative. As the Court is aware, the Circuits have been reluctant to rule that the United States is compelled to accept a stipulation when offered. *United*

States v. Barker, 1 F.3d 957, 959-60 (9th Cir. 1993); *United States v. Lloyd*, 981 F.3d 1071, 1072 (9th Cir. 1992); *United States v. Campbell*, 774 F.2d 354, 356 (9th Cir. 1985). See also, *United States v. Gillian*, 994 F.2d 97, 100-02 (2nd Cir. 1993). The United States does not accept the offer to stipulate and opposes the defendant's request to prohibit any discussion as to the existence and nature of the prior conviction. As this Court has often said, all probative evidence is inherently prejudicial. The law requires proof of the existence of a felony and the United States is prepared to make that showing.

* * *

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Transcript of Hearing on Motion in Limine)

* * *

[4] and I will give him his curriculum vitae. And the conclusion was the fingerprint did not belong to the defendant. However, we will be calling the expert to explain to the jury why a person who handles a gun might not leave the fingerprints – be fairly short testimony.

MR. DONOVAN: Okay.

Secondly, Your Honor, I have a motion in limine. And I am asking the court to order that the prosecution not refer to – specifically to Mr. Old Chief's prior felony conviction, which is alleged in Count I as assault which resulted in serious bodily injury.

As you know, Your Honor, Mr. Old Chief is charged in Count I as a felon in possession of a firearm; Count II, with use of a weapon in a violent crime; and Count III, of assault with a dangerous weapon. And I contend just the mere mention of what this prior offense, assault resulting in serious bodily injury, is highly prejudicial and not necessarily probative.

And the fact, Your Honor, I am willing not only to stipulate, but I have a proposed jury instruction which I'd like to submit for this hearing – it's labeled as Defendant's Exhibit A – whereby I am willing and agreeable to having the Court instruct the jury that Mr. Old Chief has

in fact been convicted of a felony crime, of a crime punishable by imprisonment exceeding one year. [5] And I believe there is no reason whatsoever, no necessity for the Government to introduce any evidence regarding the assault resulting in serious bodily injury or the name of it itself with the fact we are willing to agree to have the jury instructed Mr. Old Chief has been convicted of a felony.

THE COURT: Well, that would seem to cover Count I, I guess.

Rostad, what about Count II? Does that –

MR. ROSTAD: Count II does not require proof of a felony, Your Honor.

MR. DONOVAN: The other counts do not require that as an element, Your Honor. This second count goes to the one we are talking about here on October 20, '93.

MR. ROSTAD: It's all the same date, all the same activity, Your Honor.

THE COURT: What do you say then as to his Count I?

MR. ROSTAD: Your Honor, we would not like to stipulate. We intend to prove the conviction through extrinsic proof as we are obliged, as well as may do.

I think in our brief we have indicated that, yes, it's true if you pile them on – we talk about Mr. Old Chief's prior robbery as well as any other convictions he's had that may be inherently prejudicial, but the Ninth Circuit and most other Circuits say we have a right [6] to be able to prove our case. And if that involves the proof of

conviction, that is what it will be. And we request the Court to have the ability to do that.

THE COURT: All right. I overruled your motion on that point. If he doesn't want to stipulate, he doesn't have to.

MR. DONOVAN: All right.

Your Honor, we resolved the motion to suppress statement, so I have one other motion.

I filed a motion to compel fingerprint information of the information I have from the reports, and that is that a fingerprint was found on the weapon involved in this case, and that the FBI compared that print to the known prints belonging to my client, Johnny Old Chief to another individual named Jess Crawford and to another girl involved in the offense or at the scene named Stephanie Spotted Eagle, and there was no – the prints didn't match.

And I would ask the Court to order the United States to have known prints of other individuals who were at the scene of this offense, and those I have listed in the motion, Your Honor, to compare their known prints to this unknown print on the weapon, to see whether or not there's a match.

And I believe that I have no other way to do this

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. CR-94-003-GF**
vs.	)	**ORDER**
JOHNNY LYNN OLD CHIEF,	)	
Defendant.	)	

Presently before the court are a number of pretrial motions filed on behalf of defendant Johnny Lynn Old Chief. Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court holds as follows:

(1) defendant's motion for discovery is hereby DENIED;

(2) defendant's motion *in limine* is hereby DENIED;

(3) defendant's motion to supress [sic] is hereby DENIED; and

(4) defendant's motion to compel scientific examination is hereby DENIED.

DATED this 3rd day of June, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Government's Exhibit No. 1 – Certified Copy of Prior Assault Conviction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. CR-89-025-GF**
	)	
vs.	)	**JUDGMENT**
	)	**AND**
JOHNNY LYNN OLD CHIEF,	)	**COMMITMENT**
Defendant.	)	

On the 26th day of September, 1989, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, JOHNNY LYNN OLD CHIEF, appearing in his proper person and represented by his counsel, John Keith, Attorney at Law, 606 Strain Building, Great Falls, Montana 59401 (406) 727-8686.

And the defendant having been convicted on his plea of guilty of the offense charged in Count II of the indictment in the above-entitled cause, to-wit: That on or about the 18th day of December 1988, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury, in violation of Title 18 U.S.C. §§ 1153 and 113(f).

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

Pursuant to the Sentencing Reform Act of 1984, IT IS THE JUDGMENT OF THE COURT that the defendant, JOHNNY LYNN OLD CHIEF, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS.

Upon release from imprisonment, the defendant is hereby placed on supervised release for a term of TWO (2) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, local or tribal crime; and shall comply with the standard conditions that have been adopted by this court.

DATED this 28th day of September, 1989.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Trial Transcript)

* * *

[74] THE TRIAL THERE SHOULD BE ANY NEWSPAPER PUBLICITY AND ALL THAT, DON'T READ IT. JUST KEEP IT UNTIL YOU'RE RELEASED, AND READ IT AFTERWARDS AND SEE IF YOU SAW THE SAME TRIAL THEY DID.

AND THEN, ALSO, IN THE – THIS IS A BEAUTIFUL OLD ROOM, BUT IT'S NOT – KIND OF – WE ARE ALL KIND OF MIXED TOGETHER, SO BE PLEASANT AND SAY GOOD MORNING AND THAT, BUT DON'T LET IT APPEAR THAT THERE'S ANY IMPROPRIETY, YOUR TALKING TO ANY OF THE ATTORNEYS OR WITNESSES OR ANYTHING LIKE THAT DURING THE TRIAL.

OKAY. WE WILL BREAK UNTIL 1:15.

MR. ROSTAD: THANK YOU, JUDGE.

(NOON RECESS.)

(FOLLOWING PROCEEDINGS HELD IN OPEN COURT WITH ALL COUNSEL AND THE DEFENDANT PRESENT, WITH THE JURY.)

THE COURT: THE RECORD WILL SHOW WE'RE NOT ALL PRESENT, BUT THE JURY IS PRESENT. ALL RIGHT, THE RECORD WILL SHOW WE'RE ALL NOW PRESENT.

MR. ROSTAD, YOUR NEXT WITNESS, PLEASE.

MR. ROSTAD: YOUR HONOR, BEFORE I CALL OUR NEXT WITNESS, I WOULD MOVE FOR ADMISSION OF GOVERNMENT'S EXHIBITS 1 AND 5. FIVE IS NOT ON OUR EXHIBIT LIST. FIVE IS CERTIFICATION THAT THE DEFENDANT IS AN INDIAN PERSON, FROM THE BLACKFEET TRIBE. EXHIBIT NO. 1 IS HIS PRIOR CONVICTION, JUDGMENT AND COMMITMENT, WHICH IS A CERTIFIED [75] RECORD. I MOVE FOR BOTH OF THOSE UNDER RULE 902.

THE COURT: IS THERE OBJECTION?

MR. DONOVAN: I OBJECT TO ONE, YOUR HONOR, BASED ON THE MOTION IN LIMINE I FILED PRIOR TO TRIAL.

THE COURT: DENIED. BE RECEIVED. AND ALSO, FIVE IS RECEIVED.

MR. ROSTAD: WITH THAT, YOUR HONOR, WE'D CALL STACEY EVERYBODY TALKS ABOUT.

STACEY EVERYBODY TALKS ABOUT, GOVERNMENT WITNESS, SWORN.

THE CLERK: PLEASE BE SEATED RIGHT UP THERE. PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME.

THE WITNESS: STACEY RAY EVERYBODY TALKS ABOUT, E-V-E-R-Y-B-O-D-Y, T-A-L-K-S, A-B-O-U-T.

DIRECT EXAMINATION

BY MR. ROSTAD:

Q STACEY, WHERE ARE YOU FROM?

A MONTANA, OR BROWNING.

Q BROWNING.

YOU'RE A LITTLE NERVOUS. WOULD YOU LIKE A GLASS OF WATER OR SOMETHING WHILE YOU TESTIFY?

OKAY. STACEY, YOU'RE FROM BROWNING?

HOW LONG HAVE YOU LIVED IN BROWNING?

A ALL MY LIFE.

Q STACEY, DO YOU KNOW STEPHANIE SPOTTED EAGLE?

* * *

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)

District Court's Jury Instructions

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law that applies in this case.

It is your duty as jurors to follow the law as stated in these instructions, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given you in these instructions, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in this case.

Justice through trial by jury must always depend upon the willingness of each individual juror to find the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

In these instructions I shall first state some general rules or principles of law which apply to all criminal cases, and then instruct you more specifically on the law that applies to this particular case.

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the Indictment and the denial made by the "Not Guilty" pleas of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" – with no evidence against him. And the law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt, based upon reason and common sense. This does not mean, however, that you must be convinced of a defendant's guilt to an absolute or mathematical certainty, for there are few things in life of which we can be absolutely certain. What it means, rather, is that you must be persuaded of the defendant's guilt as you would want to be persuaded

about the most important concerns in your life. A reasonable doubt, in other words, does not mean a mere possibility that the defendant may be innocent, nor does it mean a fanciful or imaginary doubt or a doubt based upon groundless conjecture. In short, a reasonable doubt does not mean a doubt for the sake of doubting. What it means, rather, is an actual and substantial doubt having some reason for its basis. However, a defendant is never to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

There is nothing really different in the way a Jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question arising in the most important of their affairs and depending upon evidence presented to them. In other words, you should use, in attempting to determine where the truth lies in this case, your good sense. You should attempt to determine the actual truth here by exercising your best

judgment based upon the knowledge which you have of the characteristics of your fellow man.

If the accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

So, if the Jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the Jury views the evidence in the case as reasonably permitting either of two conclusions – one of innocence, the other of guilt – the Jury should, of course, adopt the conclusion of innocence.

Remember also that the question before you can never be: will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

An Indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a Jury may properly find a defendant guilty of a crime. One is direct evidence – such as the testimony of an eyewitness. The other is circumstantial evidence – the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply

requires that, before convicting a defendant, the Jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In every crime, there must exist a union or joint operation of act, or failure to act, and intent.

The burden is always upon the Government to prove both act, or failure to act, and intent beyond a reasonable doubt.

To establish intent, the Government must prove that the defendant knowingly did an act which the law forbids.

An act is done knowingly if the defendant realized what he was doing and did not act through ignorance, mistake or accident. You may consider the evidence of the defendant's acts and words, along with all the other evidence, in deciding whether the defendant acted knowingly.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

In determining the issue of intent, the Jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind.

Statements and arguments of counsel are not evidence in the case, unless made as an admission. When the attorneys on both sides agree as to the existence of a fact, the Jury must accept that fact as conclusively proved.

Unless you are otherwise instructed, the evidence always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have produced them; all facts which may have been admitted; all facts and events which may have been judicially noticed; and all applicable presumptions hereinafter stated in these instructions.

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible.

Upon allowing testimony or other evidence to be introduced over the objections of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

When the court has sustained an objection to a question, addressed to a witness, the Jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if permitted to answer any question.

Anything you may have seen or heard outside the courtroom touching the merits of the case is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited

to the bold statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Presumptions are deductions or conclusions which the law requires the Jury to make under certain circumstances, in the absence of evidence in the case which leads the Jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the Jury are bound to find in accordance with the presumption.

Therefore, unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong and that the law has been obeyed.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and

demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other times the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony, or by evidence that the witness has been convicted of a felony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The testimony of a single witness which produces in your minds belief in the likelihood of truth beyond a reasonable doubt is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and honesty of the one witness.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact a defendant chooses not to testify.

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's knowledge and intent and for no other purpose.

You have also heard evidence that the defendant has previously been convicted of a felony. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

You are instructed to bear in mind that an Indictment is not evidence. A defendant in a criminal case is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The Government has the burden of proving every element of a charge beyond a reasonable doubt. If it fails to do so, the jury must return a not guilty verdict on that charge.

The Indictment in this case contains three separate counts. Each count charges a separate crime against the defendant. The charges have been joined for trial. You must consider each count separately, that is, you must decide separately what the evidence in the case shows about each count. Your verdict on one count should not control your verdict as to any other count.

I shall now instruct you on the essential elements of the offenses charged against the defendant which the Government must prove beyond a reasonable doubt in order to make its case.

I remind you that only this defendant, JOHNNY LYNN OLD CHIEF, is on trial here, not anyone else, and only for the offenses charged, not for anything else. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to the charges against this defendant.

Focusing specifically on the Indictment, COUNT I charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, having been convicted of a

felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g).

With respect to the offense charged in Count I of the Indictment, you are instructed that sections 922(g) of Title 18 of the United States Code, provides, in pertinent part:

> It shall be unlawful for any person –
>
> . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . knowingly . . . possess in or affecting commerce, any firearm . . . which has been shipped or transported in interstate or foreign commerce.

In order for the defendant to be found guilty of the offense of unlawful possession of a firearm, as charged in Count I of the Indictment, the Government must prove, beyond a reasonable doubt, the following three essential elements:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, was convicted of an offense punishable by imprisonment for more than one year;

SECOND: That the defendant, JOHNNY LYNN OLD CHIEF, knowingly possessed a .9mm Jennings Bryco Model 59, serial number 604228; and

THIRD: That such possession was in or affecting interstate commerce.

I remind you again that the burden is upon the Government to prove, beyond a reasonable doubt, each and every one of these essential elements I have set forth. The law never imposes upon the defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

With respect to the first element set forth above, I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States punishable by imprisonment for more than one year.

The second element of this charge holds the Government to proving, beyond a reasonable doubt, that the defendant, JOHNNY LYNN OLD CHIEF, knowingly possessed a firearm. You are instructed that the term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

You are further instructed that the term "possess" means to exercise authority, dominion or control over. This does not necessarily mean that one must hold it physically, that is, have actual possession of it. If you find that the defendant either had actual possession or had the power and intention to control the firearm, even though it may have been in the physical possession of another, you may find that the Government has proved possession. The law recognizes that possession may be sole or joint. If the defendant alone possesses a firearm, that is

sole possession. If the defendant jointly with others possesses a firearm, that is joint possession.

The government is not required to show the defendant owned a firearm. Lack of ownership is not a defense to the offense charged.

Mere presence on the scene, plus association with illegal possessors, is not enough to support a conviction for unlawful possession of a firearm. Presence alone cannot show the requisite knowledge, power, or intention to exercise control over the firearm.

Mere Proximity to as [sic] firearm is insufficient, standing alone, to sustain a conviction for unlawful possession of a firearm.

You are further instructed that an act is done "knowingly" if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

The third element of this charge holds the Government to proving, beyond a reasonable doubt, that the defendant's possession of a firearm was in or affecting interstate commerce. I instruct you that the Government may meet its burden with respect to this element by proving, beyond a reasonable doubt, that the firearm identified in the indictment had, at any time, travelled across a state boundary line. The government does not have to prove that this defendant personally transported the firearm from one state to another. It is sufficient if the government proves that the firearm moved from one state to another prior to the time it was possessed by the defendant.

Count II of the Indictment in this case charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c).

With respect to the offense charged in Count II of the Indictment, you are instructed that section 924(c) of Title 18 of the United States Code, provides, in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall be guilty of an offense against the laws of the United States.

In order for the defendant, JOHNNY LYNN OLD CHIEF, to be found guilty of the offense of using or carrying a firearm during the commission of a crime of violence, as charged in Count II of the indictment, the Government must prove the following two essential elements beyond a reasonable doubt:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, committed a crime of violence as charged in Count III of the indictment; and

SECOND: That during and in relation to the commission of that crime of violence, the defendant, JOHNNY LYNN OLD CHIEF, knowingly used or carried

a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol.

I remind you that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

With specific reference to Count II of the indictment, I further instruct you to bear in mind the following:

(1) The crime of Assault within the Maritime and Territorial Jurisdiction of the United States is a crime of violence as that term is used in these instructions;

(2) The term "in relation to" requires there be some relation or connection between the underlying criminal act and the use or possession of the firearm.

(3) The phrase "uses or carries a firearm" means having a firearm, or firearms, available to assist or aid in the commission of the crime alleged in Count III of the indictment.

In determining whether the defendant used or carried a firearm, you may consider all of the factors received in evidence in the case including the nature of the crime of violence, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm.

The government is not required to show that the firearm was loaded or that the defendant actually displayed or fired the firearm. The government is required,

however, to prove beyond a reasonable doubt that the firearm was in the defendant's possession or under the defendant's control at the time that a crime of violence was committed. Lack of ownership is not a defense to the offense charged.

I remind you of the definition of "knowingly" previously given in these instructions.

Count III of the Indictment in this case charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

With respect to the offense charged in Count III of the Indictment, you are instructed that section 1153 of Title 18 of the United States Code, provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault with a dangerous weapon, . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Section 113(c) of Title 18 of the United States Code provides, in pertinent part:

> Whoever, within the special maritime and territorial jurisdiction of the United States,
>
> . . .
>
> [commits] assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, shall be guilty of an offense against the laws of the United States.

In order for the defendant, JOHNNY LYNN OLD CHIEF, to be found guilty of the offense of assault with a dangerous weapon, as charged in Count III of the indictment, the Government must prove the following three essential elements beyond a reasonable doubt:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, is an Indian person;

SECOND: That the incident occurred on or within the boundaries of the Blackfeet Indian Reservation, being Indian country;

THIRD: That the defendant, JOHNNY LYNN OLD CHIEF, intentionally used a display of force that reasonably caused Anthony Calf Looking to fear immediate bodily harm;

FOURTH: That the defendant, JOHNNY LYNN OLD CHIEF, acted with the specific intent to do bodily harm to Anthony Calf Looking; and

FIFTH: That the defendant used a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol.

I remind you that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

With specific reference to Count III of the indictment, I further instruct you to bear in mind the following:

(1) A semi-automatic pistol is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(2) I remind you of the definition of "knowingly" previously given in these instructions.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

I shall provide you with a verdict form for your deliberations. You must complete the form by providing your unanimous answer to each of the questions presented.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to

the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of verdict has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson, or by one or more members of the Jury. No member of the Jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the Jury on any subject

touching the merits of the case, otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the Jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – NOT EVEN TO THE COURT – how the Jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

It is proper to add the caution that nothing said in these instructions – nothing in any form of verdict prepared for your convenience – is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the Jury.

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Trial Transcript)

[334] * * *

MR. DONOVAN: RIGHT.

THE COURT: WELL, IT'S DONE. I'M SURE THEY NOTED THAT.

ANYTHING ELSE?

MR. DONOVAN: THERE'S A COUPLE MORE. PAGE 13, JUST RENEWING THE MOTION IN LIMINE, YOUR HONOR. I HAD PROPOSED DEFENSE INSTRUCTION NO. 7, AND BASICALLY AGREED TO STIPULATE AND ADMIT THAT, THE PRIOR FELONY CONVICTION, AND OF COURSE, IT'S AGAIN BROUGHT UP HERE ON PAGE 13. AND WHAT IT IS, IT'S ALL RESULTING IN SERIOUS BODILY INJURY, SO I'M JUST CONTINUING THE RECORD ON THAT.

THE COURT: VERY WELL.

MR. DONOVAN: AND THEN ON PAGE 16, THE TWO ELEMENTS FOR COUNT II, I WOULD CALL YOUR ATTENTION, YOUR HONOR, TO DEFENDANT'S PROPOSED 15, AND I BELIEVE THERE SHOULD BE A THIRD ELEMENT WHICH I HAD PROPOSED WHICH SAYS THAT THE DEFENDANT JOHNNY LYNN OLD CHIEF'S USE AND CARRYING OF SAID FIREARM MUST HAVE BEEN DURING AND IN RELATION TO THE CRIME.

THE COURT: NO, THAT'S INCLUDED IN THERE. I DON'T HAVE ANY PROBLEM WITH THAT. OKAY.

MR. DONOVAN: I THINK I ONLY HAVE ONE MORE ON PAGE 19. PAGE 19, DEALING WITH THE ELEMENTS FOR COUNT III, I BELIEVE THAT - I BELIEVE THAT ASSAULT WITH A DANGEROUS WEAPON IS A SPECIFIC INTENT CRIME, SO I HAD

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	)	NO. CR-94-003-GF JUDGMENT AND COMMITMENT

On the 26th day of July, 1994, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, **JOHNNY LYNN OLD CHIEF,** appearing in his proper person and represented by his counsel, Daniel Donovan, Federal Public Defender. #9 Third Street North, Suite 302, Great Falls, MT 59401 (406) 727-5328.

And the defendant having been convicted on his plea of not guilty, and a verdict of guilty by a jury, of the offenses charged in Counts I, II and III of the Indictment in the above-entitled cause, to-wit: **COUNT I**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, having been convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States

District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g); **COUNT II**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c); and **COUNT III**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

Pursuant to the Sentencing Reform Act of 1984, IT IS THE JUDGMENT OF THE COURT that the defendant, **JOHNNY LYNN OLD CHIEF,** is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a

term of ONE HUNDRED TWENTY (120) MONTHS on Count I; and a term of SIXTY (60) MONTHS ON Count III; the term on Count III to run concurrently with the term on Count I. As to Count II, the statute requires a five-year mandatory enhancement, in addition to the above sentence, to be served consecutively to the terms imposed for Counts I and III. The terms of imprisonment imposed by this judgment shall run concurrently with the defendant's term of imprisonment imposed by this court in No. CR-89-025-GF, Violation of Supervised Release, District of Montana.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS. This term consists of terms of three (3) years on each of Counts I and III, all such terms to run concurrently. Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another Federal, state or local crime, pursuant to § 5B1.3(a) of the Guidelines; shall comply with the standard conditions that have been adopted by this court, and shall comply with the following additional conditions:

(1) that he shall be prohibited from possessing a firearm or other dangerous weapon;

(2) that he shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the United States Probation Officer, until such time as the defendant is released from the program by the probation officer;

(3) that he shall submit his person, office, vehicle, and place of residence to a search, conducted by a United States Probation Officer, at a reasonable time and in a reasonable manner, based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation; and

(4) that he pay a special assessment to the United States in the amount of ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00), to be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013; payable immediately.

DATED this 29 day of July, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY LYNN OLD CHIEF, Defendant-Appellant.	No. 94-30277 D.C. No. CR-94-03-GF-PGH **MEMORANDUM***

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted April 14, 1995
Seattle, Washington

Before: **WRIGHT, POOLE** and **WIGGINS**, Circuit Judges.

Johnny Lynn Old Chief ("Old Chief") appeals his criminal convictions rendered by jury verdict in the federal district of Montana. Old Chief was convicted of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. The offenses charged took place on an Indian reservation, thus violating 18 U.S.C. § 1153.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Old Chief appeals on five grounds: (1) that the district court erred by allowing the prosecution to introduce extrinsic evidence of his prior felony conviction despite his offer to stipulate to his felon status; (2) that the district court erred by not ordering the prosecution to conduct fingerprint comparisons of all witnesses and individuals present at the scene of the offenses; (3) that his convictions on the assault charge and use enhancement were not supported by substantial evidence; (4) that the district court erred by not conducting a post-verdict evidentiary hearing regarding jury misconduct; and (5) that the district court improperly imposed a 57-month upward departure on his unlawful possession sentence in violation of the federal sentencing guidelines. For the reasons set forth below, we affirm Old Chief's convictions; however, we reverse his sentence and remand for resentencing.

I. INTRODUCTION OF OLD CHIEF'S PRIOR FELONY CONVICTION.

We review the district court's decision to admit or exclude evidence for an abuse of discretion. *United States v. Mullins*, 992 F.2d 1472, 1476 (9th Cir. 1993). Prior to trial, Old Chief made an offer to stipulate to his status as a convicted felon. He argued that introduction of his prior felony assault conviction to prove the element of the unlawful possession charge would be unduly prejudicial. The prosecution refused to stipulate, and the district court denied Old Chief's motion.

Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense

through introduction of probative evidence. *See United States v. Breitkreutz*, 8 F.3d 688, 690 (9th Cir. 1993) (citing *United States v. Gilman*, 684 F.2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 BALANCING PROCESS. *Breitkreutz*, 8 F.3d at 691-92.

Old Chief argues that our decision here is controlled by that in *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994) *cert. denied*, 115 S.Ct. 1147 (1995). But *Hernandez* stands for the proposition that a defendant's stipulation to a prior felony is sufficient evidence to fulfill the requisite element of § 922(g)(1). It cannot be read for the quite different proposition that a defendant's stipulation to a prior felony must always be accepted to prove the requisite element of § 922(g)(1).

Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge.

II. REFUSAL TO COMPEL THE PROSECUTION TO CONDUCT FINGERPRINT COMPARISONS.

A district court's decision as to alleged *Brady* violations is reviewed *de novo*. *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993). The law of the Ninth Circuit is unequivocal on this point: "[t]he prosecution is under no obligation to turn over materials not under its control." *See United States v. Dominquez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)).

Here, the one latent fingerprint "of value" was recovered from the bullet clip of the weapon used in the assault. Old Chief argues that, once it was determined that the latent fingerprint on the bullet clip did not match his known prints, the district court should have compelled the prosecution to conduct fingerprint comparisons of all the witnesses at the scenes of the offenses. Specifically, he contends that if the comparison resulted in a match between the latent print and the prosecution's key witness, that witness's crucial testimony would have been substantially impeached. Old Chief, however, did have access to the results of the fingerprint analysis that was conducted by the prosecution.

Consistent with its *Brady* obligations, the prosecutor turned over the potentially exculpatory results of the fingerprint analysis conducted for Old Chief and his two defense witnesses that claimed to have had contact with the gun on the day of the assault. Old Chief argued this lack of fingerprint evidence in his defense.

What Old Chief argues now, in sum, is that the prosecution's failure to obtain its own witness's fingerprints for comparison precluded and impaired his ability to present his defense. Old Chief's request, however, was tantamount to forcing the prosecution to secure evidence, not already in its possession, for use in the impeachment of its own witness. This is not required under *Brady* or *Dominquez-Villa*.

III. SUFFICIENCY OF EVIDENCE ON THE ASSAULT CHARGE AND USE ENHANCEMENT.

In determining whether the evidence was sufficient to support a conviction, we must determine whether, viewing all the evidence in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt of each essential element of the crimes charged. *Jackson v. Virgina*, 443 U.S. 307, 320 (1979); *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994).

Old Chief argues that there was insufficient evidence to convict him on the assault charge and, therefore, the use enhancement. Specifically, he argues that, assuming he did fire the shot at the victim, Anthony Calf Looking, there was no evidence that he acted with specific intent to do bodily harm, nor that the gunshot caused Calf Looking to fear immediate bodily harm.

The only uncontroverted occurrence regarding the assault is that the victim, Calf Looking, provoked the fight with Old Chief. Only one witness testified at trial that she actually saw Old Chief point the gun directly at Calf Looking and fire in his direction.

Once on the stand, Calf Looking apparently began to retreat from his earlier statements to the police. However, the prosecution witness's version of the events was corroborated by the investigating officer's testimony regarding his interview with Calf Looking the morning after the incident. Thus, despite the fact that the investigating officer's testimony impeaching Calf Looking may not be substantive evidence, it tends to bolster the direct testimony of the prosecution's key witness. Moreover, Calf

Looking testified that he heard the shot, and that he ran because he "must have been scared" of Old Chief.

In addition, a rational fact finder could conclude that the testimony offered by Old Chief's two defense witnesses was not credible. Given the inconsistencies between the witnesses' accounts of the day's events, a rational fact finder could reasonably disregard both their testimony in favor of that of the prosecution witness. Thus, considering the prosecution witness's testimony, and Calf Looking's statements regarding his fear of Old Chief, a rational trier of fact could find sufficient evidence to convict Old Chief on the assault charge.

IV. REFUSAL TO CONDUCT A POST-VERDICT EVIDENTIARY HEARING.

A district court's denial of a motion for a post-verdict evidentiary hearing is reviewed for an abuse of discretion. *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986), *cert. denied* 483 U.S. 1008 (1987). Old Chief argues that the district court should have conducted such a hearing to determine whether one juror's question to the judge and a second juror's whispers during the jury poll improperly influenced the jury's deliberations.

Despite Old Chief's attempt to characterize the whispers of one juror to another during the jury poll as an "outside influence," he made no showing of improper external influence sufficient to warrant a post-verdict evidentiary hearing. *See Tanner v. United States*, 483 U.S. 107, 127 (1987) (holding that district court did not err in deciding that a post-verdict hearing was unnecessary,

despite juror's allegations of excessive alcohol consumption and illegal drug use during deliberations).

This Court has held that "where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing 'to determine the precise nature of the *extraneous* information.' [internal citations omitted] [however,] not every allegation that extraneous information has reached the jury requires a full-dress hearing." *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986) (emphasis added). Under *Tanner* and *Langford*, the jury's exposure or access to improper *external* influence guides the decision whether a court should conduct a post-verdict evidentiary hearing.

Here, the juror's rather innocuous question to the court during the poll – and the other juror's "urging," if any, – did not imply any improper external influence on the jury's deliberations. Thus, the district court acted within its discretion in declining to contact the juror in order to hold a post-verdict evidentiary hearing.

V. IMPOSITION OF A 57-MONTH UPWARD DEPARTURE TO A TOTAL SENTENCE OF 120 MONTHS ON THE UNLAWFUL POSSESSION CHARGE.

Finally, Old Chief argues that the district court made an unreasonable upward departure in his sentence on the unlawful possession charge, thus, violating the Sentencing Reform Act of 1984 and the Sentencing Guidelines. Old Chief's arguments on this issue have merit.

Because this was his third felony assault conviction in federal court, Old Chief was designated a "career

offender." Given this designation and the levels of his current offenses, the maximum sentence Old Chief could have received under the Guidelines was 51-63 months. The district court, however, departed upward to a sentence of 120 months, imposing an additional 57-month sentence on the unlawful possession count. The term of 60 months on the assault charge, was to be served concurrently. Thus, in effect, what should have been a five-year sentence, became a ten-year sentence. Moreover, the Guidelines impose a mandatory five-year enhancement on the "use" conviction, which the judge ordered to be served consecutively.

This Court established a three-step process for the review of an upward departure from the Sentencing Guidelines in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc). First, the reviewing court must determine if the district court had legal authority to depart. *Id.* at 746. Second, any factual findings supporting the existence of an aggravating circumstance used to support an upward departure must be reviewed for clear error. *Id.* Third, the extent of the upward departure must be reasonable in light of the structure, standards and policies of the Guidelines. *Id.* at 751.

Apparently, the district court based its upward departure on the reports of the Probation Officer and U.S. Attorney that Old Chief's serious record as a juvenile offender was not reflected in his current offender designation. An upward departure is warranted when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct." *See United States v. Streit*, 962 F.2d 894, 903 (9th Cir. 1992). However, the district

court "must specify the events in the defendant's criminal history that it believes are inadequately represented in the guidelines criminal history calculation." *Id.* (citing *United States v. Hoyungowa*, 930 F.2d 744, 747 (9th Cir. 1991)). The current record is, unfortunately, silent in this regard.[1]

The district court's only statement regarding Old Chief's prior history was that "Mr. Old Chief and I have got [sic] to be friends over the years." Although we might assume that this statement was meant to be an adoption of the specific factual findings contained in Old Chief's presentence report, *see Streit*, 962 F.2d at 903, the district court's statements in the current record are too ambiguous to explain the extent of its upward departure. *See United States v. Quintero*, 21 F.3d 885, 894-95 (9th Cir. 1994).

"In order to facilitate appellate review, the district court must explain in detail the reasons behind the imposition of a particular sentence, analogizing to other Guidelines provisions." *Id.* at 894 (quoting *United States v. Hicks*, 997 F.2d 594, 599 (9th Cir. 1993)). Here, the court simply stated " . . . here again we find that [Old Chief] had just been released from custody very shortly before this occurred. There is the loaded gun. And he is a danger to the community, and a serious danger. I think there's no question about that." Even if we accept these statements

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[1] We commend Assistant United States Attorney Carl Rostad for candidly acknowledging his responsibility as a prosecutor to suggest additional findings to the district court that might assist the court of appeals, especially in sentencing matters.

as an indication of aggravating factors in support of an upward departure, the district court failed to articulate the specific reasons for the *extent* of its departure – nearly double the maximum sentence – by analogy to other Guidelines provisions. *See Hicks*, 997 F.2d at 599.

"If the district court fails to articulate reasons for *the extent* of departure or if the analogy is not reasonable, [the panel on appellate review] must vacate and remand." *Id.* (emphasis in original) (quoting *Streit*, 962 F.2d at 903). Here, because the district court neither articulated the reasons for such an extreme departure, nor analogized the reasons to particular provisions of the Guidelines, we are unable to evaluate the reasonableness of the sentence imposed as required under *Lira-Barraza*. Thus, we vacate Old Chief's sentence and remand the case for resentencing consistent with the guidelines set forth above.

VI. CONCLUSION

The district court did not abuse its discretion by allowing the prosecution to introduce extrinsic evidence of Old Chief's prior conviction, despite his offer to stipulate. Further, the district court did not err by refusing to order the prosecution to compare the latent fingerprint found on the weapon clip to the other witnesses at the scene of the offenses. The prosecution satisfied its *Brady* obligation by providing Old Chief with the potentially exculpatory evidence that the latent print did not match his known prints.

The evidence was sufficient to support Old Chief's conviction on the assault charge; and, the district court did not abuse its discretion when it refused to conduct a

post-verdict evidentiary hearing regarding alleged jury misconduct. As such, Old Chief's convictions are **AFFIRMED.**

However, because the district court failed to articulate specific reasons for its extreme upward departure by analogy to the federal sentencing guidelines, we vacate Old Chief's sentence and **REMAND FOR RESENTENCING.**

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY LYNN OLD CHIEF, Defendant-Appellant.	No. 94-30277 D.C. No. CR-94-03-GF-PGH **ORDER**

Before: **WRIGHT, POOLE** and **WIGGINS,** Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff vs. JOHNNY LYNN OLD CHIEF, Defendant.	NO. CR-94-003-GF JUDGMENT AND COMMITMENT

The Defendant, **Johnny Lynn Old Chief,** was previously sentenced by this court to a term of imprisonment of 180 months following his conviction for being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon, as charged in Counts I, II and III of the Indictment, respectively. The 180 month sentence imposed by the court envisioned an upward departure of 57 months from the maximum sentence prescribed under the United States Sentencing Commission Guidelines.[1] On May 31, 1995, the sentence was vacated by the

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[1] Application of the sentencing guidelines to Counts I and III of the Indictment yielded a guideline range of 51-63 months. The court departed upward 57 months from the maximum end of this guideline range imposing a sentence on Count I of 120

Ninth Circuit Court of Appeals and remanded for resentencing because this court failed to articulate specific reasons for the upward departure from the sentencing guidelines.

Consistent with the mandate of the Ninth Circuit Court of Appeals, the court held a second sentencing hearing on July 10, 1995. The United States was represented by Carl E. Rostad, Assistant United States Attorney for its District of Montana. The defendant, appeared in person and was represented by his counsel, Daniel Donovan, Federal Public Defender, Great Falls, Montana 59401. Having considered the arguments presented by the parties, it is the determination of this court that an upward departure from the sentencing guidelines, in the amount of 57 months, is appropriate because the guidelines fail to account for the defendant's criminal behavior as a juvenile. The defendant's juvenile record reveals repeated probation violations over a 7 year period, in which the defendant's criminal behavior became progressively more assaultive. Because the applicable guideline range contemplates only those criminal acts committed by the defendant in the 11 years he has been an adult, the guidelines do not adequately reflect either: (i) the scope of the defendant's violent criminal behavior;

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months, and a sentence on Count III of 60 months, the latter sentence to run concurrently with the term on Count i.

Application of the sentencing guidelines and 18 U.S.C. § 924(c) to Count II of the Indictment yielded a mandatory sentence of 60 months to be served consecutive to the term of imprisonment imposed on Counts I and III. With the mandatory enhancement the total sentence imposed, for all counts, was 180 months.

(ii) the escalating nature of the defendant's violence, in both frequency and severity; or (iii) the serious risk that the defendant will commit a more violent crime upon his release from prison.

The extent of the court's upward departure was determined by analogy to the sentencing guidelines. The court began from the premise that the defendant's criminal activity, as an adult, places him at offense level 17, in criminal history category VI. The court then calculated the number of additional criminal history points the defendant would have incurred, if his juvenile record were scored under the guidelines (i.e. 7 criminal history points).[2] Cognizant that 7 criminal history points is

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[2] Set forth below is an abbreviated summary of the defendant's criminal history as a juvenile. A more complete summary is provided in the Presentence Report prepared by the Probation Department. Following the description of each adjudication are the criminal history points the defendant would have received, if the guidelines were applicable to the juvenile record.

1. In December of 1977, the defendant, who was then 14 years old, pled true to an information which alleged juvenile delinquency for two counts of burglary and one count of theft. The defendant was placed on probation for the balance of his minority. [1 point – § 4A1.1(c)]
2. In May of 1978, an information was filed against the defendant which alleged juvenile delinquency for assault with a knife. The information was eventually dismissed in favor of a probation violation for the defendant's participation in the theft of a truck, and the defendant's failure to comply with the alcohol and curfew conditions of his probation. The defendant was committed to the custody of Yellowstone Boys Ranch in

equivalent to a criminal history category increase of 2⅓ levels, the court moved incrementally down the sentencing

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Billings, Montana, for observation and study. [1 point – § 4 A1.1(c)]

3. In October of 1978, the defendant violated the conditions of his probation a second time.
4. In January of 1979, the defendant enrolled at the Chemawa Indian School in Salem, Oregon. Two months later he was expelled for fighting and drinking. In October of 1979, the defendant enrolled at the Kicking Horse Job Corps Center in Ronan, Montana. Five months later the defendant was expelled because he repeatedly violated the rules and regulations of the Job Corps Center. The infractions included: (i) possession and use of drugs; (ii) possession and the manufacture of weapons; and (iii) possession of stolen property.
5. In June of 1980, the defendant's probation was violated because he participated in the burglary of a grocery store in Browning, Montana. The defendant was committed to the custody of Pine Hills School in Miles City, Montana, for a period of observation and study. [1 point – § 4A1.1(c)].
6. In October of 1980, the defendant was placed in a foster home in Alaska. While under the supervision of the District of Alaska, the defendant was allegedly involved in a fight with a student at school, and attempted to have marijuana mailed to him from Browning, Montana.
7. In November of 1981, the defendant shot a man in the face with a sawed-off shotgun. Although the shooting was subsequently determined to be in self-defense, the defendant's probation was violated because he was in possession of the illegal weapon. The defendant was committed to the custody of Pine Hills where he remained until May 12, 1982. [2 points – § 4A1.1B].

table from offense level 17 to offense level 24 – a move of three offense levels for each criminal history category increase attendant to the defendant's juvenile record.[3] Mindful that offense level 24 in criminal history category VI prescribes a guideline range of 100-125 months, the court

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8. In June of 1982, the Probation Department was advised that the defendant had become intoxicated in a bar, assaulted his girlfriend, and was involved in a fight.
9. On July 16, 1982, the Probation Department was advised that the defendant had shot another person in the foot. An arrest warrant was subsequently issued. Prior to the defendant's arrest, the Probation Department was advised by the Bureau of Indian Affairs ("BIA") that the defendant had eluded arrest, by driving his car at a high rate of speed through Browning, Montana, on one occasion, and by barricading himself inside his parent's home, on a second occasion. The defendant pled true to these events in connection with his fifth probation violation. [1 point – § 4A1.1(c)].
10. As a consequence of his fifth probation violation, the defendant was required to enroll at the Flandreau Indian School in Flandreau South Dakota. In October of 1982, the defendant was expelled from the Flandreau school for seriously assaulting another student. The expulsion gave rise to the defendant's sixth probation violation. [1 point – 4A1.1(c)]
11. In July of 1983, the defendant was involved in a high speed motor vehicle chase with BIA law enforcement officers. [1 point – 4A1.1(c)]

[3] The official commentary of the Sentencing Commission provides that an upward departure in criminal history category VI is to be structured by moving incrementally down the sentencing table to the next higher offense level in criminal history category VI until the court finds a guideline range appropriate for the case.

imposed a sentence of 120 months for Count I of the Indictment, a sentence which is reasonable in view of the structure, standards and policies of the guidelines.

Pursuant to the Sentencing Reform Act of 1984, IT IS THEREFORE THE JUDGMENT OF THE COURT that the defendant, **JOHNNY LYNN OLD CHIEF,** is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) MONTHS on Count I; and a term of SIXTY (60) MONTHS on Count III; the term on Count III to run concurrently with the term on Count I. As to Count II, the applicable statute requires a five-year mandatory enhancement, in addition to the above sentence, to be served consecutively to the terms imposed for Counts I and III. The terms of imprisonment imposed by this judgment shall run concurrently with the term of imprisonment imposed upon the defendant by this court in criminal proceeding No. CR-89-025-GF.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS on each of Counts I and III, with both terms to run concurrently. Within 72 hours of his release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another federal, state or local crime, pursuant to § 5B1.3(a) of the sentencing guidelines, shall comply with the standard conditions that have been adopted by this court; and shall comply with the following additional conditions:

(1) the defendant shall be prohibited from possessing a firearm or other dangerous weapon;

(2) the defendant shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the United States Probation Officer, until such time as the defendant is released from the program by the probation officer;

(3) the defendant shall submit his person, residence, office and vehicle to a search, conducted by the United States Probation Officer, at a reasonable time and in a reasonable manner, based on a reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn all other persons who occupy his residence, that the premises may be subject to searches; and

(4) the defendant shall pay a special assessment to the United States in the amount of ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00), to be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013; payable immediately.

DATED this 25 day of August, 1995.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

SUPREME COURT OF THE UNITED STATES

No. 95-6556

Johnny Lynn Old Chief,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 20, 1996